SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

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October Term, 1971
No. 71-183

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Petitioners,

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Petitioners,

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit and dissenting opinion were filed on May 12, 1971, and are reported at 442 F.2d 1184. A copy of these opinions is attached to Petitioners' brief and marked Appendix C. The opinion of the United States District Court, Central District of California, was filed on October 17, 1969, and is reported at 306 F.Supp. 279. A copy of this opinion is attached to Petitioners' brief and marked Appendix B.

Jurisdiction.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), and Rule 22 of the Rules of the Supreme Court of the United States. The judgment of the Court of Appeals for the Ninth Circuit was entered on May 12, 1971, and the petition for certiorari and the certified record were filed within 90 days of that date.

Questions Presented.

1. Whether or not a non-Indian lessee is exempt from property taxes assessed against his commercial lease of Indian trust land and other property.

2. Whether or not there is a plain, speedy and efficient remedy in the California courts to test the validity of the assessment of the possessory interest tax against non-Indian lessees of Indian trust lands so that the Tax Injunction Act (28 U.S.C. §1341) bars the Petitioners' suit.

Statutes Involved.

The relevant statutes are set forth in Appendix A. They are the following:

28 U.S.C. §1360
28 U.S.C. §1341
Mission Indian Relief Act of January 12, 1891, c. 65, 26 Stat. 712
California Revenue and Taxation Code §107

Statement of the Case.

This is an action brought by an Indian band and allottees to recover damages and to permanently enjoin the collection of possessory interest taxes by the County of Riverside from non-Indian lessees of Indian trust lands.

The trust lands comprise the Agua Caliente (Palm Springs) Indian Reservation. The reservation contains 26,696.28 acres of mostly non-contiguous sections of land in and around the resort city of Palm Springs, California. [T. 174, line 25, to T. 175, line 3.] The trust provisions under which the United States holds title for the use and benefit of the band and allottees is contained in the Mission Indian Relief Act of January 12, 1891, c. 65, 26 Stat. 712, and later amendments. [Amended Pre-trial Order, R. 509, lines 1-6; T. 21, line 24, to T. 25, line 8.]

The tax complained of in this action was first levied on non-Indian lessees in 1961. [T. 126, lines 11-16.] It is an *ad valorem* property tax assessed against the improvements and leasehold interest owned by non-Indian lessees of Petitioners. The measure of the tax is the market value of the property owned by the lessee, excluding the tax-exempt interest of the Indian. In making his appraisal, the County Assessor first determines the value of the land, assuming that the fee is unrestricted; by the usual methods of valuing land. The Assessor then values the tax-exempt reversionary interest. Subtracting the value of the Indian's interest from the value of the land leaves the "true value" of the possessory interest. Additional deductions are made to reflect the risk associated with the lease and the restrictions contained in the lease agreement. The final result is the "full cash value" of the possessory interest. *County of Riverside v. Palm-Ramon Development Co.*, 63 Cal.2d 534, 47 Cal.Rptr. 377, 407 P.2d 289 (1965).

At present, 1250 acres of reservation land are under long-term lease. This includes 8 acres of tribally owned land. [T. 25, lines 5-7.] The majority of these leases

were executed after 1961. [T. 190, lines 4-8.] Long term leasing of land on the Agua Caliente Reservation was authorized in 1955 by the Act of August 9, 1955, c. 615, 69 Stat. 539, as amended, 25 U.S.C. §§415-415d. Although leasing of land on the reservation has been permitted since the turn of the century, it was not until 25-year lease terms were permitted that opportunities for lease development arose. Subsequently, it became apparent that this term was insufficient to attract large investment because of the lack of adequate financing available for leases with only 25 year terms. Therefore, in 1959, Congress extended the maximum lease term to 99 years. [T. 25, line 12, to T. 27, line 4; T. 68, line 23, to T. 69, line 7.] All leases of Indian trust land are subject to the provisions of 25 C.F.R. §131 *et seq.* and the approval of the Bureau of Indian Affairs.

Two leases of reservation lands were introduced into evidence at trial, one signed before and the other after the County first assessed the possessory interest tax against a non-Indian lessee. One lease is a long-term commercial lease executed January 21, 1958, between Palm Springs Spa, the predecessor in interest of Palm Springs Properties, and the Agua Caliente Band of Mission Indians.[1] [Pltf. Ex. 4, admitted T. 48.] This lease required the construction and installation of extensive improvements on the property by the lessee ($2,800,000.00). [Pltf. Ex. 4, R. 50, line 21, to R. 51, line 2.] The buildings, trade fixtures and personal property placed on the leased land become the property

[1]Palm Springs Spa is currently seeking in the State Courts, so far unsuccessfully, a refund of the possessory interest taxes it has paid to the County of Riverside. *Palm Springs Spa, Inc., v. County of Riverside,* 18 Cal.App.3d 372, ... Cal.Rptr. .... (1971).

of the Indian upon the expiration of the lease term. [Pltf. Ex. 4, R. 16, lines 22-28.] As amended, the lease is for an initial term of 99 years.

The lease is a percentage lease. The minimum rental is $36,000.00 per annum. The lessor also receives 5% of total sales except for food sales which is 1%. [T. 132, lines 3-11; Pltf. Ex. 4, R. 15, lines 2-21.]

The other lease was entered into on November 30, 1961, between Palm Springs Spa Annex and members of the Patencio family, allottees No. 15 to 18 inclusive. [Pltf. Ex. 10, admitted T. 195.] The lease is for a term of 99 years. Buildings, improvements, trade fixtures and personal property in the value of $1,500,000.00 are required to be constructed and installed, becoming the property of the Indian upon termination of the lease. [Pltf. Ex. 10, p. 7, line 30, to p. 8, line 14.]

This lease is also a percentage lease. The minimum rental is $4,680.00 per year for the first two years; $7,800.00 per year for the next two years, and $31,200.00 per annum thereafter. The determination of the excess over the rental minimum is based on 5% of hotel and other business receipts; 1% of restaurant receipts; 2½% of liquor sales receipts and a percentage of from 15% to 7½% of receipts from subleases of all other facilities depending upon the value of the improvements constructed on the premises. [Pltf. Ex. 10, pp. 4-5.] Possessory interest taxes on the lease are deducted in computing the percentage rental. [Pltf. Ex. 10, p. 4, lines 26-31.]

The location of the property leased pursuant to the Spa lease and the Spa Annex lease is in downtown Palm Springs. [T. 13, lines 8-24.]

Both leases provide that the lessee is to pay all taxes, general and special assessments, that may be assessed "upon or against the leased land and all interests therein and improvements and other property thereon to which either the lessor or lessee may become liable in relation thereto." [Pltf. Ex. 4, R. 17, line 26 to R. 18, line 10; Pltf. Ex. 10, p. 16, lines 6-17.]

The result of the imposition of possessory interest tax on the interest of non-Indian lessees was to introduce an added element to lease negotiations. [T. 228, line 15 to T. 229, line 9.] The Indian lessor in order to reach agreement in post-1961 lease negotiations, has to agree to a rental rate that considers the lessee's possessory interest tax payment.[2] [T. 12, line 16, to T. 219, line 24; T. 70, lines 17-19.] The imposition of the tax does not affect the fair market value of the Indian trust land [T. 234, lines 16-25; T. 242, line 22, to T. 243, line 5], there being no evidence to indicate that it results in the Indian lessor receiving less than the market established (fair) net return on the property. [T. 273, lines 6-15.]

In the opinion of Leonard M. Hill, Area Director for the Bureau of Indian Affairs, the impact of the tax on development has not been "particularly negative." [T. 31, lines 10-13 and T. 31, line 22, to T. 32, line 1.] The Department of the Interior's Palm Springs Task Force in its report "Administration of Guardianships and Conservatorships Established for Members of the Agua Caliente Band of Mission Indians" dated

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[2] It is not necessarily the fact that the possessory interest tax will indirectly affect the Indian's rental income. This was recognized at trial by Petitioners in their discussion of the several ways the tax could be accomodated by the market. [T. 212, line 16, to T. 215, line 22.]

March, 1968, does not list the tax as one of the several impediments to the economic development of the reservation. The Task Force Report is contained in *Hearings on H.R. 12273 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs*, 90th Cong. 2nd Sess. ser No. 90—28, (1968) at pp. 19-193.

It is in contention of Petitioners that as a matter of law, Indian lessors are entitled to receive a net return on leases of trust land of 8% although the market or fair rate of net return is only 6%. [T. 306, line 16, to T. 307, line 5.] In order to receive this higher rate of return, California's possessory interest tax must be removed as a cost to the non-Indian lessee because the lessee is not willing to pay more to lease Indian land than non-Indian owned land. [T. 306, lines 5-10; T. 320, lines 2-6.].

ARGUMENT.

I.

The California Possessory Interest Tax May Be Validly Assessed Against Non-Indian Commercial Lessees of Indian Trust Land.

This action is somewhat bizarre in that the parties who are complaining of the tax are not the taxpayers. The petitioners' property interests are neither the subject of the challenged tax nor are their interests included in the measure of the tax. The tax is assessed against, and measured by the value of the non-Indian commercial leasehold estate that concurrently exists in their trust property. There is no way that ultimate liability for the tax can fall upon the Indians or the Federal Government. Even under the lease agreements offered into evidence and approved by the Bureau of Indian Affairs, the burden of paying the tax remains with the non-Indian lessees.

The basic question in this case is: Are Indian owners of Indian trust lands entitled to be free from any *indirect* economic impact of State taxes, thereby making tax exempt the property interests of their lessees who have no personal immunity and who lease the land for their own purposes and profit?

The Court of Appeals felt the Petitioners' position to be "untenable" [442 F.2d at 1187] and rested its decision on *United States v. City of Detroit*, 355 U.S. 466 (1958), and *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949).

In *United States v. City of Detroit, supra*, this Court upheld a tax similar to the California possessory interest tax, that was assessed against the leasehold estate of a government contractor.[3] To the argument that

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[3]Accord: *United States v. Township of Muskegan*, 355 U.S. 484 (1958).

the tax would decrease the rental income to the Government, this Court answered ". . . the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax." [336 U.S. at 472.]

Similarly, this Court speaking through Justice White in *United States v. Boyd*, 378 U.S. 39 (1964), epitomized the case law with respect to the existence of an implied Constitutional immunity from taxation as follows:

> The Constitution immunizes the United States and its property from taxation by the States, [citation] but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States. [Citations.] [378 U.S. at 44.]

Petitioners seek to distinguish *United States v. City of Detroit, supra*, by arguing that the California tax has a disastrous impact on the program of leasing Indian lands and lease revenue.[4] Without explaining the contradiction, however, they assert and have in fact imposed, what is reputed to be a tribal possessory interest tax. Suffice it to say that Leonard M. Hill, Area Director for the Bureau of Indian Affairs,[5] and the

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[4]No authority is cited for the assumption implicit in petitioners brief that they are entitled as a matter of law to a rate of return on trust lands in excess of that paid for similar non-Indian land.

[5]Mr. Hill stated: "I think after the first shock, after it was generally known that the County was assessing the tax, that the impact on the development was not particularly negative. . . ." [T. 31, lines 10-13], and "I think in recent years or the last two or three years I do not think that the imposition of a tax necessarily has slowed up the development on the leases that have been negotiated since everyone knew that the imposition would be made." [T. 31, line 22, to T. 32, line 1.]

Department of the Interior's Palm Springs Task Force do not see the impact on the lease program that Petitioners find. Neither was there any evidence to indicate that the possessory interest tax results in the Indian lessor receiving less than the market established rental rate of return. [T. 273, lines 6-15.]

The argument that a non-discriminatory property tax assessed against a third person, could as a matter of law ever be considered more than a theoretical burden on a tax-exempt entity has been previously rejected by this Court. *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949); *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1 (1937); *Choctaw, O. & G. R. Co. v. Mackey*, 256 U.S. 531, 535-537 (1921); *Gromet v. Standard Dredging Co.*, 224 U.S. 362 (1912); *Central P. R. Co. v. California*, 162 U.S. 91 (1896); *Thomson v. Union P. R. Co.*, 9 Wall. (U.S.) 579 (1870). As stated in *Union P. R. Co. v. Peniston*, 18 Wall. (U.S.) 5 (1873):

> It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform . . . [18 Wall. (U.S.) at 36-37.]

The Petitioners' position, in essence, seeks to resurrect the old "economic burden" test for tax exemp-

tion, that the Federal Government rejected as "illusory and incapable of consistent application." *United States v. Detroit*, 355 U.S. 466, 473 n.4 (1958).

The various arguments that Petitioners raise in attacking California's possessory interest tax were decided adversely to them in *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949). In that action a lessee of mineral rights[6] in Indian trust land was held to be subject to the Oklahoma gross production tax and per barrel excise tax. The gross production tax was levied at the same rate as the property tax rate and was in substance an *ad valorem* property tax under State law, 336 U.S. at 346, and treated as such by this Court, 336 U.S. at 350. The holding of the Court was expressly grounded on its earlier decisions cited in footnote 18 of the opinion that have held that "property owned by a private person and used by him in performing services for the Federal Government is subject to state and local *ad valorem* taxes." 336 U.S. at 350.

Arguments that taxation of the non-Indian lessee's property violate the trust obligation of the Federal Government to convey the land "free of all charge or incumbrance whatsoever" at the end of the trust period beg the question. They assume that the non-Indian lessee's estate is also subject to the trust provisions. This is not the law. In holding the interest of a non-Indian in Indian trust land subject to *ad valorem* taxation,

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[6]As in the present action the lease was subject to regulations of the Secretary of the Interior. 336 U.S. at 345. These regulations are more restrictive than those applicable to the leases in the present action. Compare 30 C.F.R. §§221.1-221.67 with 25 C.F.R. §§131.1-131.19.

this Court in *Bailess v. Paukune,* 344 U.S. 171 (1952) stated:

> *Levindale Lead Co. v. Coleman,* 241 U.S. 432 dealt with restrictions on alienation attached to land under the Osage Indian Allotment Act of June 28, 1906, 35 Stat. 539. The Court held that the policy of that Act did not embrace persons who were not Indians, since the Congress sought to protect only those toward whom it owed the duties of a guardian. The same answer must be given here. If Juana is not an Indian, the United States has no interest of hers in the land to protect. True, the United States holds the legal title to the land. But nothing in the act prevents the devolution of the equiable interest to the widow. If she is not within the class who Congress sought to protect, the trust is a dry and passive one; there remains only a ministerial act for the trustee to perform, namely, the issuance of a fee patent to the *cestui.* [344 U.S. at 173. Footnotes omitted.]

Similarly, this Court in *Fink v. County Commissioners of Muskogee County,* 248 U.S. 399 (1919), held that the exemption from *ad valorem* property taxes of Indian trust land, does not run with the land so as to exempt it from taxation in the hands of a non-Indian purchaser.[7] There is nothing in the Mission Indian Relief Act that indicates that Congress intended that non-Indians living off the reservation pay the costs of schools, roads, courts, police protection and all the other benefits of an ordered society for the non-Indian lessee as well as the Indian. In fact, as originally enacted, leasing of the land was forbidden—the property being "for the sole use and benefit" of the Petitioners.

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[7]To the same effect is *Sweet v. Schock,* 245 U.S. 192 (1917).

Contrary to Petitioners' argument, the commerce clause of the Constitution (art. I, §8, cl. 3) is not a bar to the California tax. State taxation of non-Indian property on Indian land has long ago been held not to impose an illegal burden or regulation of commerce with the Indian. *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Thomas v. Gay*, 169 U.S. 264, 274-275 (1898). Petitioners' argument that the California possessory interest tax violates the commerce clause because it hampers the United States in making the best lease terms for its Indian wards, while at one time used by this Court to strike down a State income tax on a non-Indian lessee's income from Indian trust property, is untenable today and without authority. *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922).

Congressional authorization for the California possessory interest tax, if such is indeed necessary, is contained in 28 U.S.C. §1360, that extended to all Indian country in California "those civil laws of such State . . . that are of general application to private persons or private property" and provides that such civil laws "shall have the same force and effect within the State. . . ."[8] Section 107 of the California Revenue and Taxation Code is certainly a civil law of general application to private property within the State of California. The leasehold estate of the non-Indian lessee, being a separate and distinct property interest from that of the

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[8]A discussion of the scope of the jurisdictional grant of Public Law 280 (18 U.S.C. §1162; 28 U.S.C. §1360) is contained in *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962).

Federal Government or the Indian,[9] and not subject to the trust provisions, is not exempted from taxation by the provisions of 28 U.S.C. §1360(b). Subsection (b) provides that "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States. . . ."

The burden is clearly on Petitioners to persuade Congress, if they feel it necessary, to enact legislation creating a tax exemption for their commercial lessees.

> This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering*, 307 U.S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "If the exemption had been intended, it would doubtless have been expressed." *Cherokee Tobacco*, 11 Wall. 616, 620. [*Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943).]

Congress is certainly aware of the existence of the application of the possessory interest tax to non-Indian lessees Such a tax was first upheld against a non-Indian leasehold estate in Indian trust land in *United States v. Erie County*, 31 F.Supp. 57 (W.D.N.Y. 1939), and its use was suggested by Congressman Utt during hearings before Congressman Haley's subcommittee in 1957. *Hearings Before the Special Subcommittee on Equalization on Land Allotments on the Agua Caliente Reservation in California of the House Committee on Interior and Insular Affairs*, 85th Cong., 1st Sess., ser. No. 17 at 41—42 (1957).

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[9] *United States v. Detroit*, 355 U.S. 466 (1958); *People v. Shearer*, 30 Cal. 645, 657 (1866).

II.

Petitioners Have a Plain, Speedy, and Efficient Remedy for Their Alleged Injury in the Courts of California.

The Tax Injunction Act, 28 U.S.C. §1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Policy that led to the enactment of the Tax Injunction Act is stated in *Matthews v. Rodgers*, 284 U.S. 521 (1932):

> . . . The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. [248 U.S. at 525.]

The United States Court of Appeals in reaching its decision on the merits, held that a person who could have been a co-plaintiff with the United States, is entitled to maintain an action in the federal courts contesting a State tax allegedly imposed on a federal instrumentality; 28 U.S.C. §1341 to the contrary notwithstanding.

In so holding the court failed to cite or distinguish its earlier opinion in *Harsh California Corp. v. County of San Bernardino*, 262 F.2d 626 (9th Cir. 1958), that affirmed the dismissal, of an action, pursuant to

28 U.S.C. §1341, to enjoin the collection of possessory interest taxes assessed against the Harsh California Corporation on its lease of tax-exempt land and improvements owned by the United States.

Nor did the court make any mention of *Lasker Boiler and Engineering Corp. v. Hamm*, 216 F.Supp. 74 (M.D. Ala. 1963), aff'd 328 F.2d 429 (5th Cir., 1964) wherein the District Court dismissed an action, pursuant to the Tax Injunction Act, to enjoin a State use tax that allegedly "violated the sovereign immunity of the United States and subjects plaintiff, as an official agency of the United States Government, to state tax action without authority therefor. . . ." [216 F. Supp. at 75.]

Merely because an Indian can sue to protect his property rights does not mean that he enjoys the same access to the federal courts as that available to the United States. It is the presence of the United States in an action, not the fact that the United States could have been present because the issue is the alleged taxation of a federal instrumentality, that creates the exception to the jurisdictional bar of 28 U.S.C. §1341.

In *United States v. Livingston*, 179 F.Supp. 9 (E.D. S.C. 1959) aff'd without opinion 394 U.S. 281 (1960), relied upon by the Court of Appeals in excepting petitioners from the operation of 28 U.S.C. §1341, the court specifically determined that the United States was not just a nominal party in that action but was in fact suing to defend its own sovereign immunity. The opinion of the court also touches on what is the real basis for exempting the United States from 28 U.S.C. §1341 in the absence of a clear and explicit expression of Congress to the contrary:

> There appears no good reason why the Congress should deny the United States the protection of the equitable powers of her own courts in a situation such as that with which we are now concerned, . . . [179 F.Supp. at 11.]

The discussion by this Court in *Department of Employment v. United States*, 385 U.S. 355 (1966), on the application of the Tax Injunction Act to suits brought by the United States, and the authorities cited at footnotes 6 and 7 of the opinion, also indicate that it is the presence of the United States in the action, and not the fact that a tax is alleged to be imposed on a federal instrumentality, that creates the exception to 28 U.S.C. §1341.

> . . . For we conclude, in accord with an unbroken line of authority and convincing evidence of legislative purpose, that §1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions. . . . [385 U.S. at 358. Footnotes omitted.]

There are numerous remedies Petitioners could have sought under California law, had they brought the present action in the State courts. These remedies are: an action in mandamus to compel the Assessor to allow the claimed property tax exemption, *Eisley v. Mohan*, 31 Cal.2d 637, 192 P.2d 5 (1948); *Lockhart v. Wolden*, 17 Cal.2d 628, 211 P.2d 319 (1941); an action to enjoin the assessment, levy and collection of the tax, *Universal Consolidated Oil Co. v. Byram*, 25 Cal.2d 353, 153 P.2d 746 (1944); *Lockheed Aircraft Corporation v. County of Los Angeles*, 207 Cal.App. 2d 119, 24 Cal.Rptr. 316 (1962); and an action for

a declaration of the validity of the tax, *Montgomery Ward & Co. v. Welch*, 17 Cal.App.2d 127, 61 P.2d 790 (1936).

The fact that the Petitioners are not liable for payment of the taxes of which they complain would not prevent them from seeking relief in the California courts. In *Department of Veterans Affairs v. Board of Supervisors*, 31 Cal.2d 657, 192 P.2d 22 (1948), a tax exempt agency of the State sought a writ of mandate to establish a tax exemption for real property in which it held a lien interest. The agency was not alleged to be liable for the taxes assessed. The court denied relief, not upon the ground that procedurally the agency could not bring the action, but because the agency was not entitled to a cancellation of taxes under California law where its property interest at the time it sought cancellation was merely that of a secured creditor.

Had Petitioners been the assessees of the possessory interest tax, the statutory remedies of payment under protest and suit for recovery of the taxes [California Revenue and Taxation Code §§5136-5143] and petition for refund and suit [California Revenue and Taxation Code §§5096-5107] would be available as well as resistance to an action by the respondent to collect the tax. *Harsh California Corp. v. County of San Bernardino*, 262 F.2d 626 (9th Cir. 1958). Indeed, it is the very lack of availability of these statutory remedies to Petitioners that permits them to seek the equitable remedies. *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102 (1906); *Jillson v. Sacramento County*, 221 Cal.App.2d 192, 34 Cal.Rptr. 419 (1963). At least one text writer has recognized that in a situation similar to that of the Petitioners, injunctive and declaratory relief would be available:

". . . One possible use of the action for declaratory relief or injunction might be the situation where a tenant has paid the tax pursuant to agreement with the landlord and where the owner cannot sue to recover the taxes, he not having paid them." [Marshall, State and Local Taxation (11 California Practice, 1969) at 174. Footnotes omitted.]

Conclusion.

Petitioners' petition for Writ of Certiorari fails to raise any of the special or important reasons for granting a review listed in Rule 19(1)(b) of the Rules of the Supreme Court of the United States and accordingly should be denied.

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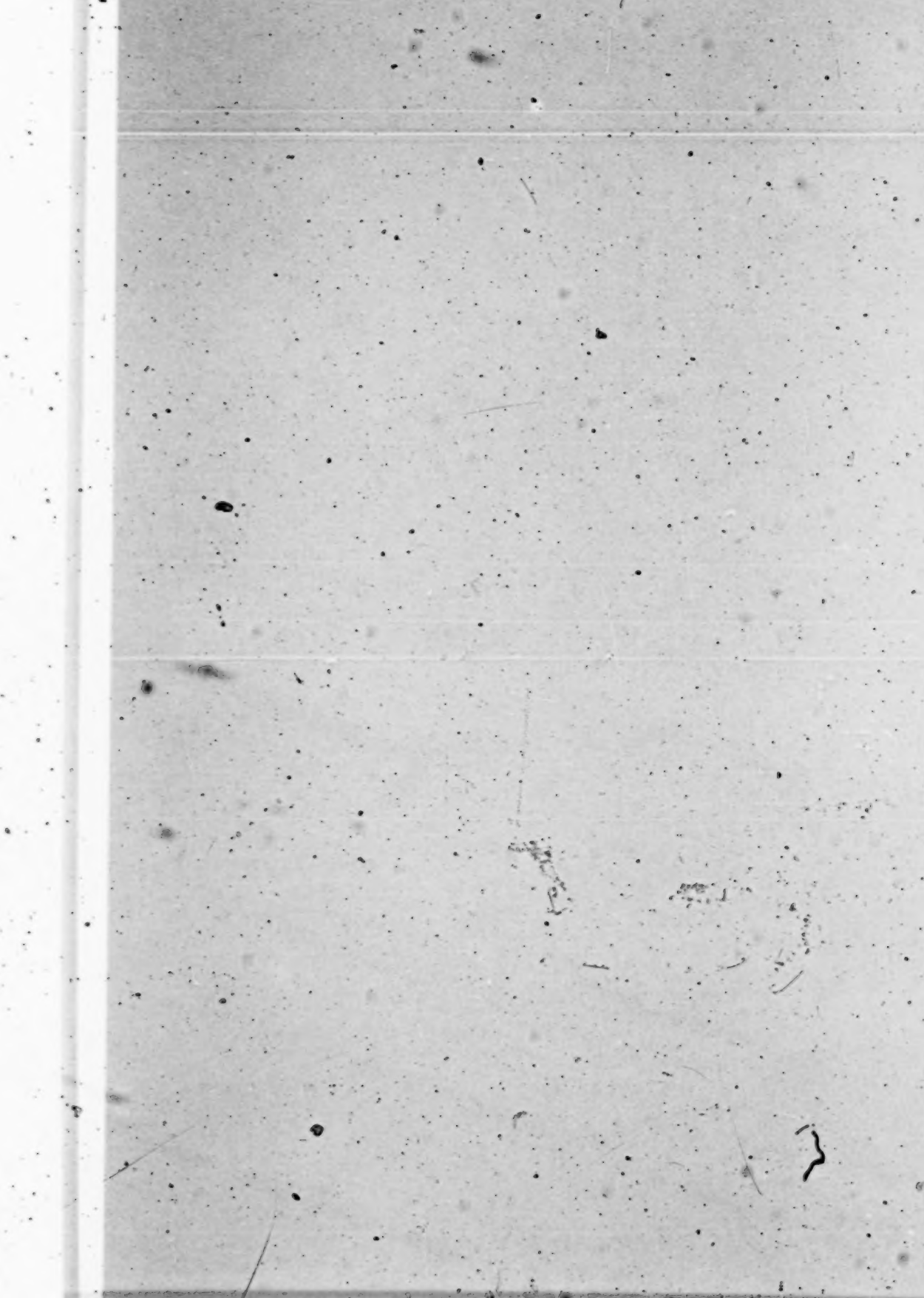

APPENDIX A.

United States Code, Title 28.

§1360. State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian Country affected
Alaska	All Indian country within the Territory.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

United States Code, Title 28.

§1341. Taxes by States.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Mission Indian Relief Act.

Act of January 12, 1891, c. 65, 26 Stat. 712

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

Sec. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistants.

Sec. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years,

in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Depart-

ment, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Intrior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservations, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the

same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

Sec. 6. That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants; it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican Government, and in an act for the government and protection of Indians passed by the legislature of the State of California April twenty-second, eighteen hundred and fifty, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

Sec. 7. That each of the commissioners authorized to be appointed by the first section of this act shall be paid at the rate of eight dollars per day for the time he is actually and necessarily employed in the discharge

of his duties, and necessary traveling expenses; and for the payment of the same, and of the expenses of surveying, the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury and not otherwise appropriated.

Sec. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe, and may grant a right of way for rail or other roads through such reservation: *Provided,* That any individual, firm or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such conditions and stipulation as said Secretary may require as a condition precedent to the granting of such authority: *And provided further,* That this act shall not authorize the Secretary of the Interior to grant a right of way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been

granted, or for any allotment therein, shall be subject to such privilege, right of way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

California Revenue and Taxation Code.

§107 "Possessory Interests."

"Possessory interests" means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land. Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 and 2919, inclusive, at any time within the three years after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof.